

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Real Estate License
Application of Equal Net Investments,
Inc.

**RECOMMENDATION ON MOTION
FOR SUMMARY DISPOSITION**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on the Department of Commerce' (Department's) motion for summary disposition at the Office of Administrative Hearings, Minneapolis, Minnesota, on November 16, 1998. The record on the motion closed on November 16, 1998, upon the close of the hearing.

Michael J. Tostengard, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130 appeared on behalf of the Department. Mark A. Levine, Davis, Dodd, Levine & Miller, Ltd., 1219 Marquette Avenue South, Suite 200, Minneapolis, Minnesota 55403, appeared on behalf of Equal Net Investments, Inc. (Equal Net or Applicant).

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Commissioner of Commerce order that:

1. The Department's Motion for Summary Disposition be GRANTED
2. The denial of Equal Net's application for licensure as a limited broker of real estate be AFFIRMED.
3. The Order is in the public interest.

Dated this 15th day of December, 1998.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject, or modify the Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An

opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Gary A. Lavasseur, Deputy Commissioner, Enforcement and Licensing Divisions, 133 East Seventh Street, St. Paul, Minnesota 55101, telephone (651) 296-2594, to ascertain the procedure for filing exceptions or presenting argument.

MEMORANDUM

On March 26, 1998, Equal Net filed an application for licensure as a limited broker of real estate. The form was signed by Shirley Ann Williams and Michael Meehan on behalf of Equal Net. Ms. Williams is President of Equal Net, Ms. Meehan is Vice-President. The application form requires that certain information regarding prior licensure, criminal matters, civil claims, tax status, and unclaimed property be disclosed. The form was checked "no" beside the question reading:

Have you ever been charged with, or convicted of, or been indicted for, or entered a plea to, any criminal offense (felony, gross misdemeanor, or misdemeanor) other than traffic violations, in any State or Federal Court?^[1]

On February 26, 1993, a criminal complaint had been filed in Hennepin County Criminal Court alleging that Mr. Meehan was guilty of theft by swindle or trick and aggravated forgery in connection with an altered document. A summons was sent.^[2]

On March 17, 1993, Mr. Meehan appeared in court for his first appearance. No bail was required.^[3] Mr. Meehan's criminal history record indicates that Mr. Meehan was arrested at that time.^[4] Mr. Meehan was arraigned on June 2, 1993, probable cause was found, and he pled not guilty.^[5]

On September 28, 1993, Mr. Meehan appeared before Judge Albrecht where he pled guilty to an unknown lesser charge and the matter was continued on condition that he complete the Operation De Novo program and pay \$13,000 in restitution within one year.^[6]

In an Order issued November 21, 1994, Defendant was allowed until September 28, 1996, to pay the restitution. Nonetheless, in October 1995, an arrest and detention was filed against him for failure to pay the restitution and he was arrested and required to post \$1,500 bail. On December 29, 1995, in accordance with the prior modification extending the time, the bail was ordered refunded and ordered to be applied to restitution.^[7]

Mr. Meehan completed Operation De Novo program and apparently satisfied the restitution condition. On September 30, 1996, the Hennepin County Criminal Court's case history indicates that the original charge against him was dismissed.^[8] The criminal history report from the BCA indicates that on that date the aggravated forgery charge was dismissed and that there was a plea of guilty at that time.

There is some confusion in the details between the facts set forth in the Hennepin County Criminal Court case history,^[9] and the criminal history record obtained from the Bureau of Criminal Apprehension,^[10] but the essential facts are clear. Mr. Meehan was charged with two felony counts relating to an altered document. Under a

plea agreement he pled guilty to some crime, but the guilty plea was not accepted. Rather, the matter was continued on condition that he complete Operation De Novo and pay restitution. He did so, and the charges were dismissed.

At the time the application was submitted on March 26, 1998, Ms. Williams had completed a request for criminal background check form and apparently submitted it with Equal Net's application.^[11] However, Mr. Meehan's request for criminal background check form was not signed until April 21, 1998, and then submitted to the Department. That happens to be one day after Appellant's Exhibit B, the Hennepin County Criminal Court's case history printout, was run.

On May 13, 1998, Equal Net's attorney in this matter obtained a letter from Operation De Novo giving a brief description of the effect of diversion to the program on criminal records. They note that their clients do not enter a plea of any type as a condition of diversion to the program and that the charges against them are dismissed when they complete the program. They note further that the clerk of court and the BCA will have a record showing their clients to have been charged, but also showing that the successful clients were never convicted of the offense. Thus, their successful clients do not have a "record" of prior convictions.^[12]

The Department processed the application on May 1, 1998.^[13] It obtained the criminal history from the BCA a few days later.^[14] The Department then informed Equal Net that its application was to be denied due to the false statement submitted in response to the question on criminal history. Respondent commenced this contested case to challenge the denial. The Notice of and Order for Hearing in this matter was issued on September 30, 1998. The Department has now moved for summary disposition, asserting that the denial of any criminal charge in the Equal Net application constitutes a "false or misleading" statement in an application in violation of Minn. Stat. § 82.27, subd. 1a.

Summary disposition is the administrative equivalent of summary judgment.^[15] Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.^[16] The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts in considering motions for summary disposition regarding contested case matters. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.^[17]

The moving party, in this case the Department, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.^[18] The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not sufficient to meet the nonmoving party's burden.^[19] The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.^[20]

When considering a motion for summary judgment, the facts must be reviewed in the light most favorable to the non-moving party.^[21] All doubts and factual inferences

must be resolved against the moving party.^[22] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.^[23]

Minn. Stat. § 82.27, subd. 1 (1998) provides, in relevant part:

Subdivision 1. **General authority.** The commissioner may by order deny, suspend or revoke any license or may censure a licensee if the commissioner finds (1) that the order is in the public interest, and (2) that the applicant or licensee or, in the case of a broker, any officer, director, partner, employee or agent or any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker or closing agent or controlled by the broker or closing agent:

- (a) has filed an application for a license which is incomplete in any material respect or contains any statement which, in light of the circumstances under which it is made, is false or misleading with respect to any material fact;

* * * *

Respondent asserts that the information given to the Department in the license application does not constitute a violation of Minn. Stat. § 82.27, subd. 1, because Mr. Meehan reasonably believed that his participation in Operation De Novo dismissed the criminal charges against him and "erased" the underlying charge.^[24]

The affidavit submitted by Mr. Meehan describes the manner in which he concluded that he could truthfully answer the criminal charge question as follows:

In light of the circumstances that I had no criminal conviction, I believed that our answer to No. 6 [the criminal history question] was true and correct. We **reasoned** that if there was no conviction and thus no criminal record, that there (*sic*) underlying charge also no longer existed.^[25]

What Mr. Meehan is referring to is expungement. But expungement is only granted upon filing a petition and after a court hearing. Minn. Stat. Ch. 609A. The law is clear that criminal charges are not expunged merely by participation in a pretrial diversion program.

Mr. Meehan is not the first applicant for a license to express a belief that his records had been "expunged."^[26] For the purposes of this motion, the good faith of Mr. Meehan's belief is presumed. The issue to be resolved is whether an applicant believing in good faith that he has never been convicted of a crime can answer the question posed in the negative without the answer being false or misleading. The ALJ concludes that he cannot.

If the question only asked about "convictions," there might be some argument. As the letter from Operation De Novo states, the result of their program is the dismissal of the criminal charges and no record of a conviction.^[27] Thus, Mr. Meehan could legitimately deny that he has ever been "convicted" of a crime because the Department of Commerce does not have a statute or rule that defines the term "conviction" to mean anything other than its common, understood meaning. In contrast, there are provisions

of statutes and rules for other licensing agencies that define “conviction” to expressly include expunged offense records^[28] and convictions where a finding of guilt is withheld.^[29]

However, in addition to asking for “convictions,” the question in this case asks whether the corporation, and by implication its officers, have ever been “charged with” or “entered a plea to” any criminal offense. Applicant submitted its application with full knowledge that a corporate officer had been charged with, and pled guilty to, a crime. Ms. Williams and Mr. Meehan “reasoned” that they could answer that question in the negative because of Mr. Meehan’s completion of Operation De Novo and the dismissal of the charges. Their conclusion was not reasonable. The plain language of the question requires acknowledgement of any charges or entry of any pleas.

The charges originally filed against Mr. Meehan were theft by trick or swindle and aggravated forgery by altering a writing. The existence of such charges against a corporate officer is the sort of information the Department needs to assess to determine whether a real estate license should be issued to the corporation. It bears directly on the qualifications of the officers to engage in the insurance business. The public interest requires that the Department evaluate the circumstances of the charges. Applicant intentionally withheld relevant information from the Department. Applicant argued that it knew that Mr. Meehan’s record would come to light in the background check. But that is no justification, particularly in light of the fact that Mr. Meehan delayed almost a month before submitting the release for the background check. No explanation of that delay has been submitted. Under the undisputed facts of this motion, the information on the application was false and misleading with respect to a material fact.

There being no genuine issue of material fact, the Department is entitled to summary disposition as a matter of law.

S.M.M.

^[1] Dept. Ex. 1.

^[2] App. Ex. B.

^[3] *Id.*

^[4] Dept. Ex. 2.

^[5] App. Ex. B.

^[6] *Id.*; Dept. Ex. 2.

^[7] App. Ex. B.

^[8] App. Ex. B.

^[9] App. Ex. B.

^[10] Dept. Ex. 2.

^[11] Dept. Ex. 1.

^[12] App. Ex. C.

^[13] Dept. Ex. 1.

^[14] Dept. Ex. 2.

^[15] See, Minn. R. 1400.6600.

^[16] **Sauter v. Sauter**, 70 N.W.2d 351, 353 (Minn. 1955); **Louwgje v. Witco Chemical Corp.**, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.

^[17] *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

^[18] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

^[19] *Id.*; Minn. R. Civ. P. 56.05; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

^[20] *Carlisle*, 437 N.W.2d at 715 (citing, *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

^[21] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. Ct. App. 1984).

^[22] See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

^[23] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

^[24] App. Ex. A.

^[25] App. Ex. A (emphasis added).

^[26] *Petition of Cunningham*, 502 N.W.2d 53, 56 (Minn. 1993)(Applicant for admission to the Minnesota bar testified he did not disclose his arrest on a bench warrant because he thought it had been "expunged." The court doubted the truth of that belief.)

^[27] App. Ex. C.

^[28] Under rules of the State Board of Medical Practice, "conviction" is defined as "a person who has been charged with a crime and the person was found guilty of that crime, regardless of length of or imposition or execution of any sentence received, any deferred finding of guilt or imposition of sentence by the court, any continuance for dismissal granted by the court, or any expungement of the offense records or conviction." Minn.R. 6700.0100, subp. 9a.

^[29] Minn. Stat. §§ 147.091, subd. 1(c) (Medical Practitioners), 148.10, subd. 1(c) (Chiropractors), 148C.09, subd. 1(7) (Alcohol and Drug Counselors).